No. 05-821
October Term, 2005

IN THE

Supreme Court of the United States

PATRICIA J. HERRING, INDIVIDUALLY; JUDITH PALYA LOETHER, INDIVIDUALLY AND AS A LIVING HEIR OF ELIZABETH PALYA (DECEASED); WILLIAM PALYA, INDIVIDUALLY AND AS A LIVING HEIR OF ELIZABETH PALYA (DECEASED); ROBERT PALYA, INDIVIDUALLY AND AS A LIVING HEIR OF ELIZABETH PALYA (DECEASED); SUSAN BRAUNER, INDIVIDUALLY AND AS A LIVING HEIR OF PHYLLIS BRAUNER (DECEASED); CATHERINE BRAUNER, INDIVIDUALLY AND AS A LIVING HEIR OF PHYLLIS BRAUNER (DECEASED),

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where government officials submitted intentionally false and misleading claims of "state secrets" privilege to obtain this Court's decision in *United States v. Reynolds*, 345 U.S. 1 (1953), are petitioners bound to plead and prove that the officials committed the crime of perjury in order to bring an independent action for fraud upon the court?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Patricia J. Herring (formerly Patricia J. Reynolds), Judith Palya Loether, William Palya, Robert Palya, Susan Brauner and Catherine Brauner respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit.

Opinions Below

The decision of the United States Court of Appeals for the Third Circuit has been reported at 424 F.3d 384 and is reproduced as Appendix A. The decision of the United States District Court for the Eastern District of Pennsylvania, dated September 10, 2004, is unreported. It is reproduced as Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered on September 22, 2005. This petition for a writ of certiorari is filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutes Involved

Federal Rule of Civil Procedure 60(b) provides:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been

> r[illegible]sed or otherwise vacated, or it is no longer e[illegible]able that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Statement of the Case

A. Background.

Three widows stood before this Court in 1952. Their husbands had died in the crash of an Air Force plane. The lower courts had awarded each of them compensation. But the United States was bent on overturning their judgments, and – to accomplish this – it committed a fraud not only upon the widows but upon this Court. The government swore that a set of reports the Air Force had prepared on the accident contained "state secrets" about the plane's mission and the experimental equipment it carried. This Court took the government at its word and vacated the widows' awards. Yet *United States v. Reynolds*, 345 U.S. 1 (1953), rests on a lie. It turns out that the Air Force reports made no mention of the plane's mission or any secret equipment on board. They described only a flight gone tragically awry due to the

Air Force's negligence. The government's "state secrets" claim was false and misleading when made and knowingly or recklessly so.

Petitioners are one of the widows and the children of the other two. After discovering the government's deceit, petitioners moved in March 2003 for leave to file in this Court a petition for a writ of error *coram nobis,* a common law writ by which an appellate court may correct its own error. The government opposed that motion, arguing that petitioners' claims should instead be pursued through an independent action for fraud upon the court under Federal Rule of Civil Procedure 60(b). This Court denied petitioners' motion for leave to file a *coram nobis* petition without comment. *In re Herring,* 539 U.S. 940 (2003).

Accordingly, on October 1, 2003, petitioners returned to the United States District Court for the Eastern District of Pennsylvania and commenced an Independent Action for Relief from Judgment to Remedy Fraud upon the Court. The district court had subject matter jurisdiction under 28 U.S.C. § 1331 and also ancillary to its original jurisdiction in *Reynolds.* 28 U.S.C. § 1367; *United States v. Beggerly,* 524 U.S. 38, 46 (1998). The government moved to dismiss petitioners' complaint pursuant to Rule 12(b)(6). Following briefing and argument, the district court granted the government's motion. *Herring v. United States,* Civil Action No. 03-5500 (LDD) (E.D. Pa. Sept. 10, 2004) (reproduced as Appendix B). Petitioners appealed and the Court of Appeals affirmed on grounds different from the district court. 424 F.3d 384 (3d Cir. 2005) (reproduced as Appendix A).

B. The Complaint.

The complaint the lower courts dismissed is reproduced as Appendix C. It alleges:[1]

1. The complaint's factual allegations must be taken as true in the present posture of this case. *Davis v. Monroe County Bd. of Education,* 526 U.S. 629, 633 (1999).

On October 6, 1948, a United States B-29 Superfortress bomber crashed near Waycross, Georgia. Nine of the thirteen men on board were killed. Three of the deceased, Robert Reynolds, Albert H. Palya and William H. Brauner, were civilian engineers assisting military personnel in testing certain electronic equipment aboard the plane. C4-5 (Complaint, ¶¶ 8-9).

In 1949, the widows of Reynolds, Palya and Brauner filed negligence suits against the United States under the Federal Tort Claims Act. The widows' cases stalled when the Air Force refused to turn over its accident investigation reports, as well as several statements of surviving witnesses, which the Air Force asserted were "privileged." C5 (¶¶ 10-11).

When first called upon to defend this assertion, the United States made no claim that the accident reports and statements contained any "state secrets or facts which might seriously harm the Government in its diplomatic relations, military operations or measures for national security." *Brauner v. United States,* 10 F.R.D. 468, 472 (E.D. Pa. 1950). Rather, the government insisted only that "proceedings of boards of investigation of the armed services should be privileged in order to allow ... free and unhampered self-criticism within the service." *Id.* The district court held no such privilege existed and ordered the Air Force to produce the materials. *Id.* at 471-72. *See also* C5-6 (¶¶ 11-12).

It was only after production had been ordered that the United States first invoked "state secrets" protection.[2] The government supported this claim with a sworn, formal "Claim of Privilege" signed by the Secretary of the Air Force, Thomas F. Finletter, and an affidavit signed by the Judge Advocate General of the Air Force, Major General Reginald K. Harmon. C6, C29-34, C36-37 (¶¶ 13-15 & Exs. C and D).

Secretary Finletter's "Claim of Privilege" first renewed the Air Force's claim for a self-evaluative privilege, urging again that "disclosure of statements made by witnesses and air-crewmen before Accident Investigation Boards would have a deterrent effect upon the much desired objective of encouraging uninhibited statements in future inquiry proceedings instituted primarily in the interest of flying safety." C30. But the Secretary then advanced a second, separate ground for withholding the documents:

> The defendant further objects to the production of this report, together with the statements of witnesses, for the reason that the aircraft in question, together with the personnel on board, were engaged in a confidential mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of its mission or information concerning its operation or performance would be prejudicial to the Department and would not be in the public interest.

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2. The Air Force requested rehearing of the motion to compel in a July 24, 1950 letter from the Secretary of the Air Force to the district court. This letter stated that "it has been determined that it would not be in the public interest to furnish this report of investigation as requested by counsel." The letter, however, pointed solely to Air Force regulations regarding air accident investigations and the need for "optimum promotion of flying safety," and did not mention the possibility of "state secrets." The Air Force first raised "state secrets" at a hearing before the court on August 9, 1950. *See Reynolds v. United States*, 192 F.2d 987, 990 (3d Cir. 1951).

In making this new claim, the Secretary specifically described the documents as "reports of Boards of Investigation and statements of witnesses *which are concerned with confidential missions and equipment of the Air Force.*" C31 (emphasis added).

In his affidavit Major General Harmon also renewed the Air Force's claim for a general self-evaluative privilege. But then he too, like Secretary Finletter, swore that

> such information and findings of the Accident Investigation Board and statements which have been demanded by the plaintiffs cannot be furnished without seriously hampering national security, flying safety and the development of highly technical and secret military equipment.

C37. Major General Harmon stated that in lieu of production of the documents, the Air Force would allow the three surviving crew members "to testify regarding all matters pertaining to the cause of the accident except as to facts and matters of a classified nature." C37.

Upon rehearing, the district judge directed that the accident reports and witness statements be produced for his *in camera* inspection. C39-40 (Ex. E). The United States refused to comply with this order. On October 12, 1950, after the district court was satisfied that the government would not produce the documents even to the court, it held the Air Force in default and deemed its liability to the widows established. C7, C42-43 (¶ 17 & Ex F). The district court then held a hearing on damages and entered judgments in the widows' favor totaling $225,000. C7 (¶ 18).

On appeal, the Court of Appeals accepted the Air Force's affidavits at face value, understanding them to assert, in addition to a self-evaluative privilege, that "the documents sought to be produced contain state secrets of a military character." *Reynolds v. United States,* 192 F.2d 987, 996 (3d Cir. 1951). The Court of Appeals agreed with the district court, however, that it was within the competence of